

**U.S. Department of Interior Workshop:
“ADR and Natural Resources: What’s Working? What’s Not?
Where Do We Go From Here?”
Workshop Summary**

The workshop was held November 2-3, 1999 at the Federal Energy Regulatory Commission in Washington, D.C. It was hosted by Bob Baum and Elena Gonzalez of the Office of Hearings and Appeals at the U.S. Department of Interior, and facilitated by Kirk Emerson and Emily B. Rudin of the U.S. Institute for Environmental Conflict Resolution, Tucson, Arizona, and Gregory Sobel, Esq. of Environmental Mediation Services, Sudbury, Massachusetts. A list of participants and contact information is attached. (*See Attachment A*)

This report provides highlights of the day-and-a-half discussion. Every attempt has been made to ensure accuracy. For the reader’s convenience, a glossary of abbreviations used throughout this report is located at the back. (*See Attachment B*)

WORKSHOP GOALS

At the outset of the meeting, participants described their goals for this workshop:

- Initiate dialogue on ADR for natural resources
- Build ECR program within Department of Interior
- Prepare for Spring 2000 conference on ECR and Natural Resources
- Collect ECR stories from bureaus
- Provide lens/filter for assessing appropriateness of ECR processes
- Discuss prevention, management, and resolution
- Discuss different types of ECR
- Learn how FACA works/fits

The facilitators said that the workshop would address all of these goals to varying degrees. With the limited available time, the depth to which each goal and topic would be addressed would depend on the participants’ interests. However, FACA would not be addressed in depth; it has important and somewhat complicated implications for ECR initiatives by federal agencies, and requires time and certain participants not available at this workshop.

EXPERIENCES WITH ECR

Prior to the workshop, participants were asked to come prepared to discuss specific case examples in which ECR approaches had worked or not worked. Participants broke into subgroups, then reported back to the full group for discussion of positive and negative factors from five case examples (outlined at the end of this section) that indicated the likelihood of ECR success for those cases. These factors--summarized immediately below--are grouped by category (some factors could be placed in more than one category). Almost all of the factors could be topics that bureaus should consider before convening the parties.

FACTORS INFLUENCING LIKELIHOOD OF SUCCESS WITH AN ECR APPROACH TO NATURAL RESOURCE CONFLICTS

Agency Preparation Before Convening the Parties

- Education about process for all (participants, mediators/facilitators, and public)
- Up-front preparation with stakeholders and process strategy
- Ensure policy-makers' buy-in to process
- Flexibility in ways to reach decision-makers above staff/technical-level participants
- Ascertain and encourage commitment to process by all stakeholders
- Develop strategy to engage more stakeholders if only some are interested at outset
- If key stakeholders refuse to try ECR process, consider not proceeding
- Process design
- Set appropriate timeframes (e.g., decision by a certain date; for regulatory and other legal processes)
- Ground-rules must be clear and appropriate for nature of disputes and acceptable to participants
- Confidentiality (of communications during process; between parties and neutral)

Existing Conditions

- Law or Congress compels process
- Parties sometimes more receptive to judicial mandates
- Agency's understanding of role of facilitation
- "Upstream" involvement of elected officials
- Participants' Best Alternatives to a Negotiated Agreement (BATNA) will influence their negotiating flexibility

Mediator Characteristics

- Must have right mediator for particular dispute (e.g., substantive expertise, experience with experts)
- Credibility and qualifications of mediator from parties' perspective
- Mediator's neutrality--actual and perceived

During ECR Process

- Include common definitions, reference points, rules of engagement
- Participants must check back periodically with their constituencies
- Representatives able to "bring constituents along"
- Participants' "authority" to negotiate
- Momentum of process can influence participation by those initially reluctant
- Mediator can try to begin with smaller points for consensus to build momentum

- Conducive physical setting
- Media: fairness of coverage and ability to report

Considerations in Evaluating the Outcome

- What constitutes “successful resolution”?

Cases Discussed Regarding Factors That Point to Success or Problems in Applying ECR Processes to the Conflict

Case	Selected Factors (+ / -)
Utah Ferrin Natural Gas (BLM)	<ul style="list-style-type: none"> + Engaging more stakeholders + Sponsor’s understanding role of facilitation process + Upstream involvement by elected officials
Kane City Road Agreement (BLM)	<ul style="list-style-type: none"> - Representatives able to bring constituents (stakeholders not there) - Potential procedures - Setting needed
Indian Trust Lands	<ul style="list-style-type: none"> - Proper parties with authority to act - /+ BATNAS - /+ Constructive use of power/authority - Setting timeframe
Lewis Mountain Campground	<ul style="list-style-type: none"> + Opportunity to engage in upfront planning: <ul style="list-style-type: none"> ▪ Ground rules ▪ Confidentiality ▪ Media--fair coverage and ability to report ▪ Process design

WHEN IS IT APPROPRIATE TO USE OR NOT USE ECR?

Workshop participants presented several case studies, outlined below, as part of a discussion about when it might or might not be appropriate to use ECR:

84 Mining Company Case

- Access dispute
- Uncertainty about key party's real interests
- Not clear how case fits within DOI bureaus' jurisdiction
- A critical “nonparty” needed to be involved in discussion
- How to allow out-of-court resolution given that case was in litigation

Port America Project

- The intervention did help settle the case, which concerned a development on Potomac River
- Important unidentified parties
- Involvement of developer was critical
- Dispute arose in context of §404 Clean Water Act, which provided a window for “mediation”
- Multi-party power imbalances
- Communication problems
- High public interest
- Agency staff were empowered to facilitate resolution

BLM Road Widening Project (Board of Land Appeals)

- No settlement from this intervention
- No perceived middle ground; parties opposing proposed project used environmental arguments as a handle to stop development
- Mediation may have been offered too late in dispute when positions had hardened
- Intervention was limited in time and scope--it was a single conference call
- Neutral was a BLA hearing officer
- Internal conflict assessment and/or professional mediator as advisor would have been useful

EXAMPLES OF SUCCESSFUL ECR EFFORTS BY DOI BUREAUS

Workshop participants from three different DOI bureaus presented cases in which they were involved to illustrate some ECR principles and successful practices:

Limestone Hills Case, BLM **Points and Lessons: John Schumaker**

- 10-year dispute was resolved in two mediated sessions
- Conflict assessment determined that hunters and recreational users of the resource were not necessary parties to ECR effort because their concerns were not at issue. While this judgment might be surprising, since those groups were, in a sense, stakeholders, it proved correct!
- Strong management leadership during negotiations
- Underlying interests different than stated positions (e.g., company needed mining plan, not necessarily immediate implementation)
- It was helpful during process that explicit goal was not "agreement," but rather movement towards agreement
- Custom-designed process, not “cookie-cutter”
- Mediator not needed for all steps--some of the consensus-building work took place without the mediator

- Implementation and maintenance concerns: durability, new players, adaptive management

Cape Cod National Seashore Reg-Neg, NPS
Points and Lessons: Maria Burkes

- Off-road vehicles and habitat protection
- Conflict assessment advised not to try a regulatory negotiation at this time because a key stakeholder group is not sufficiently flexible for negotiations to be promising. It preferred status quo to likely outcome of a reg-neg
- This calculus changed when Park announced that regulation in question would definitely be changed, thus eliminating status quo.
- Park determined that it had “nothing to lose” by trying a reg-neg, since relationships could hardly get worse and existing rule was unworkable
- Park felt that there would be benefits even if no consensus, suggesting that there are various measures of "success." For example, issues in dispute might be narrowed, and in any case, Park would be better informed if it had to write new rule without consensus
- Consensus was reached (surprisingly). Other benefits:
 - Better working relationships
 - Park Advisory Committee operates more smoothly than before
- Add-on issue (jet-skis) inserted by advocacy groups on last day of reg-neg shouldn't have been included because those users were not at table
- FACA issues complicated and slowed process

Use of ADR in Habitat Conservation Plans, USFWS
Points and Lessons: Sean Skaggs

- Characteristics of Habitat Conservation Plans suggest ECR potential, in general:
 - Multiple species, jurisdictions, stakeholders
 - “Battle of experts” is a common and unproductive element:
 - "Jeopardy" standards are open to argument
 - Mitigation “to the extent possible” is highly debatable

In this case:

- Interagency split was present but also need for interagency cooperation
- Shadow of litigation provided incentive to settle through negotiation
 - "Takings" issue might be litigated
 - Administrative Procedures Act was grounds for possible litigation
- Scope of HCP was at issue, such as how to include non-native species
- Lower Colorado River
- HCP was an umbrella for several contentious issues:
 - Banking
 - Restoration
 - Removing land from agriculture
- Mediator activism was helpful
- ADR was first initiated in 1993:

- Concern about interference with management authority
- Role of trained natural resource specialist was important
- Science-based decision-making was at heart of disputes
- Effectiveness of ADR in settling complex and sensitive natural resource issues was demonstrated in this case
- Employee training was needed

RESULTS OF BLM AND USFS SURVEY ON USE OF ADR: **JOHN SCHUMAKER, BLM**

Graphed results from Schumaker's survey of BLM and USFS attitudes toward use of ADR are attached. (*See Attachment C*)

BARRIERS/CHALLENGES TO GREATER USE OF ECR

Workshop participants worked in breakout groups and jointly to generate a list of barriers and challenges to greater use of ECR within DOI:

Limited Resources to Conduct ECR and to Implement ECR Settlements

- Funds for ECR services are often not available (even though ultimate savings; also, some resistance to using Headquarters funds—perceived strings attached)
- Lack of other needed resources--personnel; time
- Lack of information about ADR
- Inadequate funding for ECR training:
 - For mediation and other ECR interventions
 - For participation in ECR negotiation
 - For conflict assessments
 - For general education about ECR
 - For hiring neutrals
 - For pilot projects
 - For other expenses (stakeholder processes and administration)
 - For marketing (brochures, websites)
- Resource limits to pay for cost of ECR settlement and implementation.
- May be easier to find money for court-imposed "settlement" than for negotiated settlements

Internal Resistance to Using ECR

- Senior managers not "on board"
- Field staff resistance
- Reluctance to get off of a track the agency has followed in a case (momentum)
- FACA interpretations vary among legal counsels
- General resistance to change
- Ignorance within office, and lack of buy-in, concerning ECR

- Arrogance on part of lawyers re ECR
- Lawyers' lack of trust in agreements and handshakes
- Misconceptions of ECR as a way of ceding authority and obligations
- Fear of being seen as ineffective
- Fear of loss of control
- Agency scientists' views on their roles and their agencies
- Cultural/institutional barriers
- Conflict avoidance

Structural Limitations

- Unclear authority to settle
- Different bureaus have different experiences with outcomes in administrative courts
- Different statutory authority

Uncertainty About Right Time to Attempt ECR

- Timing: positions harden downstream (close to litigation). However, one workshop participant who is an administrative law judge said he finds it easier to induce settlement when the parties realize, often rather late, that they are stuck

Uncertainty About Which Cases Are Appropriate

- Identifying appropriate issues, where ECR can succeed
- Special complications arise when a dispute has strong interagency conflict
- Different cultures and outlooks need to be addressed in deciding how to proceed

OPPORTUNITIES AND RECOMMENDATIONS FOR GREATER USE OF ECR

As throughout this summary, the list below represents points raised by workshop participants, rather than consensus recommendations:

- Solicitor's Office could recommend ECR to decision-makers (especially when conflicts first identified)
- Screening process in Solicitor's Office, and at lower field offices too. Need screens at several levels in agency (even in litigation, can refer out) and at various times in life of dispute
- Build in ECR to consultation function (e.g., Bureau of Indian Affairs) during 60-day notice period
- More education and training
- Develop mediation capability within bureaus and build ECR capacity to co-mediate, where appropriate for use of in-house neutrals
- Locate ECR experts to advise bureaus on use of ECR
- Training in art of consultation concerning tribes

- Define “conflict assessment” factors, principles, protocols
- Develop evaluation processes within DOI’s ECR program for assessment and referral
- Get beyond “collateral duty” problem
- Endorsement/directive from Secretary to pursue appropriate use of ECR
- Follow-up to workshop
- Make funds available for ECR services
- Funding should be under regional control
- Even if Headquarters provides money, make explicit policy of regional control (but need a trust relationship)
- Use in-house neutrals, when appropriate
- Keep managers with access to funding up to speed on progress of negotiations
- Enroll senior managers in ECR initiatives
 - Create reward system
 - Performance evaluation
- Order from Board of Land Appeals
- Clarify settlement authority
- Write and distribute ECR case studies to address fears and misconceptions, share lessons, credit staff, clarify FACA
- Clarify ADRA, FOIA requirements
- FACA summit to work through issues and develop consistent approach
- Coach negotiators and in-house mediators
- Show off publicly what’s been successful--publish, present, etc.--laud it
- Agencies should receive separate annual funding for ECR
- Funding should not be centralized if agency has any field offices
- Incentives for using ECR
 - Awards
 - Performance standards (tied to available resources)
- Requirements to use ECR a certain number of times per year--“try it”
- Try to reduce repetitive complaints through establishing rapport and communications with plaintiffs and potential adversaries
- Provide complete training in ECR to overcome reluctance and ignorance—both classroom-based and hands-on (learning by doing)

SHOULD DOI USE IN-HOUSE NEUTRALS?

Greg Sobel gave a presentation on the question of agency use of in-house neutrals, a fast-growing phenomenon in federal and state government nationally. Many workshop participants consider themselves in-house neutrals because, as part of their jobs, they help resolve agency disputes not as a representative of the agency’s interest in a conventional sense, but rather as a kind of “third party.” Roles that agency staff play that they might consider as in-house neutral span a wide range. At one end is the uncontroversial role of advising agency colleagues about when and how to use consensus-building approaches in handling contentious issues. At the other end is the practice of employees actually mediating disputes in which their agency is a party.

While administrative law judges have long acted to help settle cases on their dockets, the practice of other agency program staff mediating cases is relatively new and considered problematic by many observers. The variety of roles that agency staff play in trying to help parties resolve disputes involving the staff member's employer need to be examined in terms of both effectiveness and ethics. Below are some perceived advantages and disadvantages of in-house neutral practice.

Why Do It?

- **No cost to parties.** While agency neutrals are paid as employees, parties to the dispute can use their services without direct expense.
- **No procurement procedures.** Cost and procurement procedures can be barriers to using outside neutrals. These barriers are not encountered when using in-house staff.
- **Quick availability.** In-house neutrals can often be available more quickly than contracted neutral service providers.
- **Institutional and subject expertise.** In-house neutrals can bring useful knowledge of agency structure, culture and procedures as well as knowledge about the subject matter at issue.
- **Professionally satisfying for neutral.** One reason this is a fast-growing area of activity is that agency employees who are trained in mediation or related processes find it professionally satisfying to serve in that capacity.
- **Creates perception of agency progressiveness.** Effective use of in-house neutrals might support a public image of the agency as responsive and eager to solve problems.
- **Commitment of staff long-term.** In-house neutrals who are long-term agency employees may demonstrate their concern for the long-range outcomes and may remain available to assist in the implementation of agreements in ways not possible for outside neutrals.

What Are the Pitfalls?

- **Bias or perceived bias.** Even when an in-house neutral remains clear and consistent in not demonstrating favoritism, parties may fear or perceive a bias.
- **Subtle coercion to accept neutral.** As in the choice of any neutral service provider, the parties must be free to accept or reject anyone considered. Nonetheless, there might be a perceived subtle pressure on, for example, a regulated party to accept the in-house neutral who works for the agency that has ultimate authority in the case at hand or future matters.
- **Confidentiality problems.** An effective neutral must have the authority to speak

confidentially with all parties. The in-house neutral encounters special confidentiality issues when, for example, a colleague or supervisor asks for protected information.

- **Possible conflict with neutral's responsibilities as public agency employee.** The in-house neutral has responsibilities to the public that might interfere with the neutral role. For example, what if a party to a case mediated by an in-house neutral confides to the mediator about an improper activity that the agency, if aware, would be obliged to address.

These and other advantages and disadvantages call for careful consideration before an agency employee offers his or her services as a neutral. More broadly, they should be thoroughly explored prior to deciding whether such services should even be offered in the first place.

DOI AND BUREAU ROLES AND ACTIVITIES IN ECR

Workshop participants generated the following list of roles that DOI employees play in ECR processes:

- Advocating for ECR: in general and case-specific
- Identifying conflicts
- Screening, conflict assessment, and process design
- Using neutrals: in-house and out-house
- Selecting cases for ECR, selecting neutral service providers
- Managing ECR cases
- Performing--serving as an in-house neutral
- Negotiating--a party "at the table"
- Providing technical expertise: as a party, as a neutral resource
- Evaluating ECR activities: programmatic and case-specific
- Coordinating activities and information
- Capacity-building and training in:
 - Screening and conflict assessment
 - Facilitation and mediation
 - Negotiation and communication
- Funding and procuring: by program and by case
- Supporting involvement in ADR (e.g., coaching practitioners and users)
- Designing dispute resolution systems

AGENCY ADR ROLES AND ACTIVITIES: PROGRAM PRESENTATIONS FROM DOI BUREAUS, EPA, AND FERC

Presenters from BLM, BOR, EPA, and FERC described their experiences and observations in creating and administering successful ADR programs in their agencies.

Roles and Activities: BLM (John Schumaker)

- Do all kinds of ECR
- Advocate ECR
- Identify conflicts appropriate for ECR
- Screening/conflict assessment/process design
- Use neutrals
- Negotiate, representing BLM in ECR cases
- Provide technical expertise
- Evaluate ADR efforts
- Coordinate activities and information
- Capacity building and training (at request of personnel, not forced on them)
- Funding and procurement
- One convert at a time, be patient!
- Reports on BLM's ECR programs will soon be available on CD and on BLM's website
- Natural resource strategic plan
- ADR tool kit
- 1 full-time person (Schumaker); others serve on collateral duty
- ADR outside service provider roster
- Talk with your procurement people early in process of selecting neutral
- Competitive procurement may take longer but yield lower cost
- Training often includes other stakeholders

Roles and Activities: Bureau of Reclamation (Zell Steever)

- Advocate ECR
- Identify conflicts for ECR
- Screening/conflict assessment/process design
- Ongoing groups address policies, systems, etc.; include working managers
- Use neutrals: in-house and external
- Negotiate for BOR in ECR cases
- Provide technical expertise
- Evaluate ECR efforts
- Coordinate activities and information
- Capacity building and training (on request, not forced)
- One convert at a time
- Systematic approach

- One key person (Gary Bracken) made it happen
- ADR is a tool about relationships
- Training: 16 ADR advisors
 - 1 in each regional office
 - 1 in each program office
- ADR advisors report to line managers
- Sometimes use MOBIS contract to procure ADR services
- People plus other resources = broad support
- Strong commissioner support

Roles and Activities: Environmental Protection Agency (Dave Batson)

- EPA does all kinds of ECR, including ECR systems design
- Cultural change = different ways to meet goals
- New incentives--“beans”--give credit for settling
- Allocation of funds
- Multi-level approach
- Several contracting/procurement mechanisms
- KISS: Keep It Simple to say “yes” to ECR
- Build multiple opportunities into system to consider ECR
- Go slow to go fast programmatically: use pilots, build successes
- Headquarters funds some regional ADR activities
- Service approach:
 - Credo: if not solving problem with the tool, don’t do it
 - Design program to fit problems
 - Match to needs and cultures
- 20+ full-time employees working on ADR
- Collateral-duty neutrals
- Staff facilitators
- \$42 million budgeted for 5 years
- ADR specialists in:
 - Program areas
 - Regional offices
 - Office of Administrator
- ADR now built into performance standards
- (Department of Justice goes further and puts ADR in user’s position description)

Roles and Activities: Federal Energy Regulatory Commission (Kasha Helget)

- Advocate ADR
 - Hotline--“The buck stops here”
 - Informal, internal record, hundreds of calls annually
- Identify conflicts

- Screening (team of 8-10 staff; report to chairman)
- Use neutrals
 - “Settlement judge”
 - Full-time ADR people
- Negotiate for FERC in ADR cases where FERC is a party
- Provide technical expertise
- Evaluate ADR cases and ADR program
- Programmatic
- Case-specific
- Coordinate across FERC
- Capacity building and training
- Funding/procuring (even with cutbacks)
- Supporting ADR (e.g., coaching FERC employees who are serving as neutrals)
- Cases in which ADR was used are typically resolved with less time and cost for all
- Best way to get buy-in: promote success stories from inside and outside
- Initially, latch onto cases with greatest likelihood of success--even small controversies
- Focus is dispute resolution service
- Chairman strongly supportive
- Process-literate staff and judges integral

POSSIBLE NEXT STEPS

Participants generated a list of activities and ideas they felt would be useful for DOI to pursue in following up on this workshop:

- Periodic meetings of DOI's ADR advocates
- Program and bureau meetings
- Create more dispute resolution specialist positions (e.g., field people, bureau assignments at DOI)
- Send names of additional people to participate in Office of Hearings and Appeals ADR effort
- Keep generating ideas for new ECR initiatives
- Consider work details dedicated to ECR
- Hire 1-2 full-time senior ECR people into Office of Hearings and Appeals
- Use outside facilitators/neutrals
- Consider establishing an ECR steering committee/brain trust
- Marketing needed and could be shared throughout and across bureaus
- Simplify process for procuring outside neutrals
- Get position descriptions from Dave Batson, EPA
- Build ECR use incentives into employee performance standards
- Develop ECR program manager's manual
- Attorney General's report in January
- One person converted at a time
- Build it and they will come, one person at a time

- One person can make a big difference
- Top-level managers need exposure and training (from regional directors up); once is not enough
- Secretarial directive would help; need continuous encouragement
- Take advantage of regional meetings and executive briefings for ECR promotion
- Try to reduce staff fear of raising ECR funding issues
- Use ADR to work with Native American tribes

OTHER ISSUES AND IDEAS FOR FURTHER EXPLORATION

- Mandatory use of ECR
- Need bibliography of ECR resources
- Link up websites
- Funding and procurement:
 - Do we really need money for training in-house mediators now?
 - Re BOR, most parties/disputes re natural resources best suited for outside mediators, not in-house
 - For EEOC/"inside" conflicts, can use in-house effectively, but be sure to monitor contractors
 - KISS--Keep ECR systems simple to use
- Plan now for 2001
- Recognize that settlements and agreements will appropriately take different forms
- Importance of tracking cases, assessment, monitoring implementation
- Education/outreach
- Marketing is essential
- Demonstration projects
- Adaptive leadership--learn and adjust over time

NEEDS FOR ADDITIONAL ECR TRAINING

Participants suggested needs they have for ECR training:

- FACA/FOIA/ADRA
- Procurement issues
- Confidentiality
- Federal Records Act issues
- Effective representation of clients in mediation (see DOJ's Office of Legal Education)
- Interagency conflicts
- How to use ADR services to best advance DOI's interests
- Negotiation skills training
- Training must be related to role of staff person and what ECR roles they would play and clients they work with
- Community-based training such as that done by USFWS

- Department-wide target for same levels of ECR staff across services/bureaus
- Interagency training needed (especially given protracted 1-A conflicts)
- Systems design training (see Constantinos book on system design)

SUGGESTED SOURCES FOR TRAINING OPPORTUNITIES

Workshop participants suggested several sources of ADR training resources:

- Institute for Performance Management Improvement
- Contact Bob Moll at DOI: (202) 208-5216
- USFWS community-based training; try National Training Center in Shepherdstown, WV
- CREW – NPS – collaboration
- Training listings at USIECR's website: www.ecr.gov

GLOSSARY OF ABBREVIATIONS

(In this summary, ECR (environmental conflict resolution) is used to refer to alternative dispute resolution (ADR) processes when applied to environmental issues. There are numerous places in this summary where ADR could be substituted for ECR.)

ADR	Alternative dispute resolution
ADRA	Administrative Dispute Resolution Act
BATNA	Best Alternative to a Negotiated Agreement
BLA	Board of Land Appeals
BLM	Bureau of Land Management
BOR	Bureau of Reclamation
DOI	Department of Interior
DOJ	Department of Justice
ECR	Environmental conflict resolution
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
FACA	Federal Advisory Committee Act
FOIA	Freedom of Information Act
HCP	Habitat Conservation Plan
OHA	Office of Hearings and Appeals (Department of Interior)
MOBIS	Management Organizational and Business Improvement Services
NPS	National Park Service
Reg-Neg	Regulatory negotiation, also called negotiated rulemaking
USFS	U.S. Forest Service
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey
USIECR	U.S. Institute for Environmental Conflict Resolution